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No. 80-1365.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

STATE OF CONNECTICUT,
PETITIONER,

v.

MOHEGAN TRIBE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief Amici Curiae Of The State of South Carolina, Et Al In Support Of Petitioner

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Table of Contents.

Statement of interest of amici curiae	1
Summary of argument	3
Reasons for granting the writ	5
I. The issues involved are of major public importance and affect claims to millions of acres of land in South Carolina, New York and other states	5
II. The decision of the United States Court of Appeals for the Second Circuit conflicts with prior decisions of this Court	7
III. The Court of Appeals incorrectly interpreted the applicability of the Trade and Intercourse Acts	13
A. Congress did not intend that the Trade and Intercourse Acts apply outside "Indian Country"	13
B. Congress intended that the "surrounded by settlements" exception apply to transfers of land	17
Conclusion	20
Appendix A	follows page 20

Table of Authorities Cited.

Cases.

American Fur Co. v. United States, 27 U.S. 450, 2 Pet. 358 (1829)	4, 11, 12
Bates v. Clark, 95 U.S. 471, 5 Otto 204 (1877)	4, 13
Catawba Indian Tribe of South Carolina v. State of South Carolina, Civil Action No. 80-2050-6 (D.S.C., filed October 28, 1980)	2n

Cayuga Indian Nation of New York v. Carey, Civil Action No. 80-CV-930 (N.D.N.Y.; filed October 29, 1980) 2n

Cherokee Nation v. State of Georgia, 30 U.S. 25, 5 Pet. 1 (1831) 16n

Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979) 5n

Mashpee Tribe v. Town of Mashpee, 447 F.Supp 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) 5n

Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F.Supp. 798 (D.R.I. 1976) 6n

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 15

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 10n

Oneida Indian Nation of New York v. State of New York, Civil Action Nos. 78-CV-104, 79-CV-798 (N.D.N.Y., filed respectively in 1978 and on December 3, 1979) 5n

Schaghticoke Tribe of Indians v. Kent School Corp., 423 F.Supp. 780 (D. Conn. 1976) 6n

United States v. Holliday, 70 U.S. 182, 3 Wall. 407 (1866) 4, 19

United States v. State of Maine, Civil Action Nos. 1966-NC and 1969-ND (D. Me., filed June 29, 1972 and July 14, 1972) 5n

Wampanoag Tribe of Gay Head v. Town of Gay Head, Civil No. 74-5826-G (D. Mass., filed Nov. 28, 1974) 6n

Western Pequot Tribe of Indians v. Holdrige Enterprises, Inc., Civil No. H-76-193 (D. Conn., filed Mar. 27, 1977) 6n

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 4, 7, 8, 9, 10 et seq.

Wilson v. Omaha Indian Tribe, 444 U.S. 817 (1979) 10

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution
art. I, § 8, cl. 3 13, 19

25 U.S.C. passim 14

28 U.S.C. § 2415(a) 6n

25 U.S.C.A.
§ 177 (1963) (the "Nonintercourse statute") 2, 3, 4, 5, 7 et seq.
§ 194 (1963) 7, 9
§ 1701 et seq. (1979 Supp.) 6n

U.S. Rev. Stat., tit. XXVIII, ch. 3, § 2116 (1873) 3n, 17n

Indian Trade and Intercourse Acts (codified at 25 U.S.C.A. § 177 (1963) (the "Nonintercourse statute") and at 25 U.S.C.A. § 194 (1963)) 2, 3, 4, 5, 7 et seq.

Act of July 22, 1790, ch. 33, 1 Stat. 137 13, 15, 16
§ 1, 1 Stat. 137 et seq. 14, 17
§ 4, 1 Stat. 137, 138 2n, 17

Act of March 1, 1793, ch. 19, 1 Stat. 329 13n
§ 1, 1 Stat. 329 et seq. 13n
§ 6, 1 Stat. 329, 330 20n
§ 8, 1 Stat. 329, 330 2n
§ 13, 1 Stat. 329, 331 17

Act of May 19, 1796, ch. 30, 1 Stat. 469 13n
§ 1, 1 Stat. 469 14
§ 12, 1 Stat. 469, 472 3n

§ 19, 1 Stat. 469, 474 17n
Act of March 3, 1799, ch. 46, 1 Stat. 743 13n, 14
§ 1, 1 Stat. 743 et seq. 13n, 14
§ 12, 1 Stat. 743, 746 3n
§ 19, 1 Stat. 743, 749 17n
Act of March 30, 1802, ch. 13, 2 Stat. 139 4, 8, 11, 12, 13 et seq.
§ 1, 2 Stat. 139, 141 12, 15
§ 12, 2 Stat. 139, 143 3n
§ 19, 2 Stat. 139, 145 17n
Act of April 29, 1816, ch. 165, 3 Stat. 332 14n
Act of March 3, 1817, ch. 92, 3 Stat. 383 14n
Act of May 6, 1822, ch. 58, 3 Stat. 682, 683 8, 9, 12, 13, 14n
Act of May 28, 1830, ch. 148, 4 Stat. 411 15n
Act of June 30, 1834, ch. 161, 4 Stat. 729 4, 8, 9, 10, 13 et seq.
§ 12, 4 Stat. 729, 730 3n
§ 20, 4 Stat. 729, 732 13
§ 22, 4 Stat. 729, 733 (codified at 25 U.S.C.A. § 194 (1963)) 7, 8, 9, 10, 11
§ 29, 4 Stat. 729, 734 11, 17n
Treaty with The Cherokee Nation, July 8, 1817, 7 Stat. 156 15n

FEDERAL RULES AND REGULATIONS.

Supreme Court Rule 36.4 1n

LEGISLATIVE MATERIALS.

H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834) 9
Pub. L. No. 96-217, § 1, 94 Stat. 126 (1980) (codified at 28 U.S.C. § 2415(a)) 6n

S. Rep. No. 96-569, 96th Cong., 2d Sess. 8 (1980) (Pub. L. No. 96-217) 6n

MISCELLANEOUS.

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Brief of Amici Curiae in Support.

Statement of Interest of Amici Curiae.

This brief *amici curiae* is submitted by the State of South Carolina and Lancaster County, York County, the City of Rock Hill and the Town of Fort Mill in the State of South Carolina, and the County of Seneca in the State of New York.[1]

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[1] In accordance with Sup. Ct. R. 36.4, for the purpose of filing this brief, the State of South Carolina is sponsored by its Attorney General, Daniel R. McLeod; Lancaster County is sponsored by its county attorney, Phillip Wright; York County is sponsored by its county attorney, John M. Spratt, Jr.,; the City of Rock Hill is sponsored by its city attorney, Charles W. F. Spencer, Jr.; the Town of Fort Mill is sponsored by its town attorney, B.

The South Carolina *amici* are defendants in an action commenced by the alleged Catawba Indian Tribe of South Carolina.[2] The claims of the Catawba Indians involve title to 144,000 acres of real property in the State of South Carolina and damage claims of an unspecified amount. The County of Seneca in the State of New York is defendant in an action commenced by the alleged Cayuga Indian Nation of New York.[3] The pending and threatened claims of the Cayuga Indians total approximately three million acres of land in the State of New York and include damage claims of hundreds of millions of dollars.

The actions commenced by the Cayuga Indians and the Catawba Indians are predicated upon claimed violations of those provisions of the various Indian Trade and Intercourse Acts regulating transfers of Indian lands ("the Nonintercourse statute").[4] The applicability of these and related provisions of the Trade and Intercourse Acts to Indians claiming land in the eastern United States was the primary issue decided in this case by the Court of Appeals for the Second Circuit. Because

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Bayles Mack; and Seneca County is sponsored by its county attorney, John M. Sipos.

[2] *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, Civil Action No. 80-2050-6 (D.S.C., filed October 28, 1980).

[3] *Cayuga Indian Nation of New York* v. *Carey*, Civil Action No. 80-CV-930 (N.D.N.Y., filed October 29, 1980) (one action pending, one action threatened). In this action, the Cayuga Indians assert a claim to approximately 62,000 acres of land in Seneca and Cayuga Counties in the State of New York. The Cayuga Indians also have stated that they plan to file suit claiming an additional 3,000,000 acres of land.

[4] These provisions regulating the alienation of Indian land, presently codified at 25 U.S.C.A. § 177 (1963), and referred to by the Court of Appeals as the "Nonintercourse statute," always were enacted as part of the more comprehensive Indian Trade and Intercourse Acts. (*Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*, filed on behalf of the State of Connecticut ("App."), at 7a-11a.) The term "Nonintercourse statute" as used by the Court of Appeals referred only to those sections of the various versions of the Indian Trade and Intercourse Acts regulating the alienation of Indian land. The Nonintercourse statute

the issues decided by the Court of Appeals may be dispositive of the claims of the Cayuga and Catawba Indians, the South Carolina and New York *amici* submit this brief in support of the State of Connecticut's petition for a writ of certiorari.

Summary of Argument.

This case presents for review two issues potentially dispositive of Indian claims to millions of acres of land in the eastern United States. These issues are, first, whether the Nonintercourse statute was intended to apply only to land in "Indian country," as defined in the various Indian Trade and Intercourse Acts and, second, whether the "surrounded by settlements" exception in those Acts was intended to apply to transfers of land. The United States Court of Appeals for the Second Circuit held that the Nonintercourse statute applies to Indian land throughout the United States, and that the "surrounded by settlements" exception does not apply to land transfers.

The Court of Appeals' unprecedented holdings make vulnerable to Indian claims millions of acres of land in the eastern United States. Within the past ten years, law suits concerning title to lands in the eastern United States have been commenced by at least twelve groups of Indians in six states. Many of these suits are still pending and more have been threatened. The issues of the geographic applicability of the Nonintercourse statute and the transactional applicability of the "surrounded by settlements" exception should dispositive of all these pending and threatened claims.

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was first adopted on July 22, 1790. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138. It was subsequently reenacted by: Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730; Rev. Stat. § 2116. (*See* App. C.)

In addition, the Court of Appeals' holding that the Nonintercourse statute applies to all Indian lands throughout the United States conflicts with prior decisions of this Court. This Court recently has held that the 1834 Trade and Intercourse Act was intended to apply only to "Indian country." *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979). This Court reached the identical conclusion in *Bates* v. *Clark*, 95 U.S. 471, 5 Otto 204 (1877), and in *American Fur Co.* v. *United States*, 27 U.S. 450, 454, 2 Pet. 358, 369 (1829) (construing the 1802 Trade and Intercourse Act).

It also is clear from the legislative history and the language of the various Trade and Intercourse Acts that Congress did not intend the Nonintercourse statute to apply outside "Indian country." These Acts were enacted in an effort to regulate relations with those Indian tribes on the western frontier in order to assure peace and security in that volatile territory. At the same time, Congress chose to leave to the states the regulation of relations with Indians within their borders and subject to their jurisdiction.

Congress also intended that the "surrounded by settlements" exception apply to transfers of land. This intent is clear from the language and structure of the Trade and Intercourse Acts. This construction draws further support from the decision of *United States* v. *Holliday*, 70 U.S. 182, 3 Wall. 407 (1866), in which this Court equated "trade or intercourse" with "commerce," thus giving the exception an expansive interpretation which would encompass transfers of land.

The extensive recurrence of the issues decided by the Court of Appeals and the conflict between the decision of the Court of Appeals and the prior decisions of this Court require a definitive restatement of the governing law to assure correct and uniform results in all pending and future Indian claims to land in the eastern United States.

Reasons for Granting the Writ.

I. The Issues Involved are of Major Public Importance and Affect Claims to Millions of Acres of Land in South Carolina, New York and Other States.

The narrow issue decided by the United States Court of Appeals for the Second Circuit was whether the Nonintercourse statute was applicable to the lands in the State of Connecticut claimed by the appellee, the alleged Mohegan Tribe. As the Court of Appeals readily acknowledged, however, the broader issue before it concerned the applicability of the Nonintercourse statute to Indians and tribes of Indians located to the east of the "Indian country" delineated by those Acts. (App. 3a.) The import of the decision below thus extends far beyond the claims asserted by the appellee.

Groups of Indians in other eastern states recently have asserted numerous land claims predicated upon alleged violations of the Nonintercourse statute. These groups of Indians include the Cayuga Indians (New York);[5] the Oneida Indians (New York);[6] the Catawba Indians (South Carolina);[7] the Passamaquoddy and Penobscot Indians (Maine);[8] the Maliseet Indians (Maine); the Mashpee Indians (Massachusetts);[9] the Chappaquiddick Indians (Massachusetts);[10] the Narragansett

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[5] *See* n.3, *supra*.

[6] *Oneida Indian Nation of New York* v. *State of New York*, Civil Actions Nos. 78-CV-104, 79-CV-798 (N.D.N.Y., filed respectively in 1978 and on December 3, 1979) (pending claims to approximately 5,000,000-6,000,000 acres of land).

[7] *See* n.2, *supra*.

[8] *United States* v. *State of Maine*, Civil Actions Nos. 1966-ND and 1969-ND (D. Me., filed June 29, 1972 and July 14, 1972) (resolved legislatively).

[9] *Mashpee Tribe* v. *Town of Mashpee*, 447 F.Supp. 940 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (action dismissed after jury trial).

[10] *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979) (affirming dismissal of claims by individual Indians).

Indians (Rhode Island);[11] the Western Pequot Indians (Connecticut);[12] the Schaghticoke Indians (Connecticut);[13] and the Gay Head Wampanoag Indians (Massachusetts).[14] Each of these claimants[15] seeks the return of vast amounts of real property and monetary damages for prior transfers allegedly violative of the Nonintercourse statute. Although the history of each of these groups varies, each may have been subject to the ordinary jurisdiction of a state since at least 1789, and each may claim land to the east of the "Indian country" borderline defined by the various Trade and Intercourse Acts. Consequently, the issue of the geographic applicability of the Trade and Intercourse Acts may be dispositive of these claims.

In the State of New York alone, the land claims of the Cayuga and Oneida Indians[16] involve 9,000,000 acres of

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[11] *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976) (resolved legislatively; 25 U.S.C.A. § 1701 *et seq.* (1979 Supp.)).

[12] *Western Pequot Tribe of Indians* v. *Holdrige Enterprises, Inc.*, Civil No. H-76-193 (D. Conn., filed Mar. 27, 1977) (pending).

[13] *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780 (D. Conn. 1976) (denial of defendant's motion to amend answer to add defenses of laches, adverse possession, statute of limitations and state market title statute; granting of motion to amend answer to add defenses of waiver and estoppel) (pending).

[14] *Wampanoag Tribe of Gay Head* v. *Town of Gay Head*, Civil No. 74-5826-G (D. Mass., filed Nov. 28, 1974) (pending).

[15] In 1980, Congress extended the applicable statute of limitations for the commencement of Indian damage claims by the United States to December 31, 1982, thus keeping courtroom doors open to new claimants. Pub. L. No. 96-217, § 1, 94 Stat. 126 (1980) (codified at 28 U.S.C. § 2415(a)). In connection with this legislation, the Department of Interior reported that it now is processing some 9,768 Indian claims and stated that more than 5,000 additional, identifiable claims may not yet have been inventoried. S. Rep. No. 96-569, 96th Cong., 2d Sess. 8 (1980) (Pub. L. No. 96-217). Undoubtedly many of these claims may arise in situations where the Nonintercourse statute would be applicable.

[16] The importance of the Court of Appeals' decision to the Cayuga and Oneida Indians is best evidenced by the Motion to Modify Decision which they filed with that Court.

public and private lands and hundreds of millions of dollars. Similarly, the claims of the Catawba Indians involve title to 144,000 acres of real property in South Carolina and damage claims of an unspecified amount. Thus, the issues decided by the Court of Appeals are clearly not sporadic; rather, the issues have arisen and will continue to arise in litigation, pending and threatened, throughout the eastern United States. The peculiar gravity and general importance of these questions justify the granting of certiorari.

II. The Decision of the United States Court of Appeals for the Second Circuit Conflicts with Prior Decisions of this Court.

The decision below conflicts with this Court's recent decision concerning the geographic applicability of the 1834 Trade and Intercourse Act. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979). In *Wilson*, the Omaha Indian Tribe claimed, as part of its reservation, a tract of land on the bank of the Missouri River. The defendants, including the State of Iowa and several individuals, contended that past movements of the Missouri River had "washed away part of the reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian land owners." 442 U.S. at 657. One of the two principal issues before the Court was the proper allocation of the burden of proof in this quiet title action. Resolution of this issue required interpretation of section 22 of the 1834 Trade and Intercourse Act, now codified at 25 U.S.C.A. § 194 (1963), which provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession of ownership.

The Court specifically was required to determine whether the "white persons" to whom section 22 shifted the burden of proof in title litigation with Indians included the "sovereign States of the Union," such as the defendant State of Iowa. 442 U.S. at 667.

Writing for the Court, Justice White first carefully analyzed the purpose of the 1834 Trade and Intercourse Act in its entirety, and section 22 in particular:

> The provision first appeared in slightly different form in 1822, Act of May 6, 1822, 3 Stat. 683, as part of an Act amending the 1802 Indian Trade and Intercourse Act, Act of Mar. 30, 1802, 2 Stat. 139, which was one of a series of Acts originating in 1790 and designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians. Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these Acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions. The 1822 provision was part of this design; and with only slight change in wording, it was incorporated in the 1834 consolidation of the various statutes dealing with Indian affairs. Act of June 30, 1834, 4 Stat. 729.

442 U.S. at 664-65 (footnote omitted).

Justice White then considered and reviewed the precise statutory language chosen by Congress to effect this purpose:

> [I]n terms of the purpose of the provision — that of preventing and providing remedies against non-Indian squatters on Indian lands — it is doubtful that Congress anticipated such threats from the States themselves or in-

> tended to handicap the States so as to offset the likelihood of unfair advantage. Indeed, *the 1834 Act, which included § 22, the provision identical to the present § 194, was "intended to apply to the whole Indian country, as defined in the first section."* H.R. Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished. . . ." 4 Stat. 729. Although this definition was discarded in the Revised Statutes, see Rev. Stat. § 5596, *it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.*

442 U.S. at 667-68 (emphasis added).

Having construed section 22 to be applicable only within Indian country and only to disputes not involving any of the states, Justice White concluded that Congress could not have intended the phrase "white person" to include any of the states. *Id.* In so holding, the Court, by implication, confirmed that all the provisions of the various versions of the Trade and Intercourse Acts were intended to apply only in Indian country. The conclusion of the Court of Appeals in this case that the coverage of those Acts extends to all Indian tribes wherever located thus is in direct and irreconcilable conflict with *Wilson*.

Shortly after *Wilson* was decided, the Solicitor General filed a Motion for Modification of Opinion.[17] Specifically, the Solicitor General sought deletion of that portion of the opinion

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[17] The Solicitor General's Motion for Modification of Opinion is set forth in full as Appendix A of this Brief.

in which the Court discussed "the geographic applicability of the Nonintercourse Act of 1834" on the grounds that this "language . . . may well be seemed dispositive of a number of pending eastern land claim cases . . .."[18] In support of his Motion, the Solicitor General argued that: (1) section 22, in contrast to other sections of the 1834 Trade and Intercourse Act which were expressly made applicable only in Indian country, made no reference to Indian country and therefore was without geographic limitation; and (2) resolution of the geographic applicability of section 22 was not essential to determination of *Wilson* and consequently that portion of *Wilson* discussing the limited applicability of the Trade and Intercourse Acts could be deleted without affecting the result in *Wilson*. On October 2, 1979, this Court denied the Solicitor General's Motion for Modification. *Wilson* v. *Omaha Indian Tribe*, 444 U.S. 817 (1979).

The *Wilson* interpretation of the geographic scope of the Trade and Intercourse Acts[19] has particular application in this

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[18] Among the claims enumerated by the Solicitor General were those of the Catawba Indians of South Carolina and the Cayuga Indians of New York.

[19] As the Court of Appeals correctly recognized (App. 25a), this Court's decision in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), does not dictate a different result. In *Oneida*, the narrow issue was whether a claim of right to possession of land based upon the Nonintercourse statute stated a "federal controversy within the jurisdiction of the District Court . . .." 414 U.S. at 666. In holding that such a claim stated a federal question, the Court noted that "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." 414 U.S. at 670 (*dictum*). Thus, the Court of Appeals stated that "it would be consistent with *Oneida* to hold, as the State argues, that land transfers in Indian country were to be governed by the statute, but that the exclusion of eastern lands from the Nonintercourse statute meant that the 'federal law' as to those lands was to allow the states to purchase them." (App. 25a.) *Oneida* thus left undecided the issue eventually resolved by *Wilson*.

Moreover, assuming *arguendo* that *Oneida* can be read to construe the Trade and Intercourse Acts to apply within the original thirteen states, *Oneida* and *Wilson* are easily harmonized. Certain portions of the "Indian country" boundary passed through some of the original thirteen states. At

case for two reasons. First, in affirming the District Court's denial of the Motion to Dismiss, the Court of Appeals stated that "the language of the Nonintercourse statute makes its dictates applicable to Indian land located anywhere in the United States" and that "Congress was quite explicit when it needed to refer either to Indian country or to the Indian boundary." (App. 11a, 13a.) This precise argument, however, was implicitly rejected in *Wilson* and also was rejected by the Court when asserted by the Solicitor General in his Motion for Modification. Although the provision of the Trade and Intercourse Act at issue in *Wilson* was not, by its express terms, confined to Indian country, the Court nevertheless held that provision to be of limited geographic applicability. The analysis of the purpose of the Trade and Intercourse Acts, which led the Court to conclude that in enacting the Trade and Intercourse Acts, Congress had in mind only disputes arising in Indian country, requires that the Nonintercourse statute also be held to apply only to Indian country.

Second, section 29 of the 1834 Trade and Intercourse Act repealed the 1802 Indian Trade and Intercourse Act except for Indian tribes residing east of the Mississippi River. Act of June 30, 1834, ch. 161, § 29, 4 Stat. 729. As to those eastern Indian tribes, the 1802 Indian Trade and Intercourse Act remained effective. The final provision of section 1 of the 1802 Act demonstrates, however, that "all the provisions contained in [the 1802] act" were limited in application to "Indian country" as defined therein. Thus, the version of the Trade and Intercourse Act which applies in this case expressly confined the applicability of its provisions to "Indian country."

This limitation in coverage, which the Court of Appeals rejected, was confirmed by this Court in *American Fur Co.*

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various times, portions of New York, Pennsylvania, North Carolina and Georgia were located within "Indian country." Thus, the Trade and Intercourse Acts applied to the original thirteen states to the extent that those states were located within "Indian country."

v. *United States*, 27 U.S. 450, 454, 2 Pet. 358, 369 (1829). In *American Fur*, a licensed Indian trader was accused of carrying ardent spirits into Indian country for the purpose of sale or distribution in violation of the 1802 Trade and Intercourse Act, as amended by the Act of May 6, 1822, ch. 58, 3 Stat. 682. The Court, in considering the trial court's instruction to the jury on the propriety of the seizure of the trader's goods "'in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes'" 27 U.S. at 454, 2 Pet. at 367, held that all provisions of the 1802 Trade and Intercourse Act were applicable only in Indian country:

> If we have rightly interpreted this part of the instruction, we feel no hesitation in saying, that we cannot accede to the corrctness [*sic*] of the instruction thus qualified, since it would subject to seizure and forfeiture all the goods of the trader carried into a country, not only belonging to the United States, but *lying without the boundaries of the Indian country, as they are described by the 1st section of the Act of 1802; to which all the provisions contained in that Act, and consequently those contained in the amendatory Act of 1822, are by that section expre y confined.* If the country referred to in this instruction was purchased of the Indians subsequent to the 30th of March, 1802 so as that the boundary line thereby became varied; then the above section declares that all the provisions of that Act shall be construed to apply to the boundary line so to be varied, in the same manner as they apply by force of that Act to the boundary line therein recited.
>
> If we misunderstand the meaning of this instruction, it is so probable that it might have been misunderstood by the jury, that justice demands a re-trial of the cause.

27 U.S. at 454, 2 Pet. at 369 (emphasis added).

The Supreme Court reached the same conclusion in *Bates* v. *Clark*, 95 U.S. 471, 5 Otto 204 (1877). The *Bates* plaintiffs claimed that the defendants, two officers of the United States Army, had committed a trespass by seizing the plaintiffs' whiskey. The defendants asserted that the seizure had taken place in Indian country and therefore was justified by section 20 of the 1834 Trade and Intercourse Act (forbidding the introduction of wines and spiritous liquors into Indian country). Construing the 1834 Trade and Intercourse Act, Justice Miller held that the Act "is a very long and important Act [which] begins by describing in its first section the country or territory in which that Act shall be operative." 95 U.S. at 471, 5 Otto at 205.

These conflicts between the decision of the court below and the decisions of this Court warrant the granting of certiorari.

III. The Court of Appeals Incorrectly Interpreted the Applicability of the Trade and Intercourse Acts.

A. *Congress Did Not Intend that the Trade and Intercourse Acts Apply Outside "Indian Country."*

The power of Congress to regulate trade and intercourse with "the Indian Tribes" is expressly provided in the Constitution. U.S. Const. art. I, § 8, cl. 3. That power was exercised promptly in the second session of the First Congress by passage of "An act to regulate trade and intercourse with the Indian tribes." Act of July 22, 1790, ch. 33, 1 Stat. 137 *et seq.* When the Act and its successor Acts expired, they were replaced by similar Acts regulating relations with the Indian tribes.[20] In 1802, Congress enacted another version of the Trade and Intercourse Act which did not contain any limitation on the time

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[20] Act of March 1, 1793, ch. 19, 1 Stat. 329 *et seq.*; Act of May 19, 1796, ch. 30, 1 Stat. 469 *et seq.*; Act of March 3, 1799, ch. 46, 1 Stat. 743 *et seq.*

of its effect. The 1802 Trade and Intercourse Act was amended and supplemented in 1816,[21] 1817,[22] and 1822;[23] and in 1834, Congress passed the 1834 Trade and Intercourse Act. Certain provisions of the 1834 Trade and Intercourse Act remain positive law and are codified in 25 U.S.C. *passim*.

Read together, these acts evidence a single, continuing effort to regulate relations only with those Indian tribes on the western frontier. *See generally*, Paterson and Roseman, *A Reexamination of Passamaquoddy* v. *Morton*, 31 Me. L. Rev. 115 (1979). In their respective first sections, the 1796, 1799 and 1802 Trade and Intercourse Acts each contained a definition of the "Indian country" boundary line to which all the provisions of the Acts were to apply. (App. 61a-62a, 71a-72a, 74a-75a.) This defined "Indian country" line followed the boundaries of the lands reserved to the several Indian tribes by treaty and was expressly subject to alteration by later treaty. *See Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*, filed on behalf of the State of Connecticut, ("Petition for Cert."), at 5-6. In the event of such alteration, these Acts provided that:

> then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

1796 Trade and Intercourse Act, § 1; 1799 Trade and Intercourse Act, § 1; 1802 Trade and Intercourse Act, § 1.

This limitation on the geographic applicability of the Trade and Intercourse Acts derived directly from concern with de-

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[21] Act of April 29, 1816, ch. 165, 3 Stat. 332.

[22] Act of March 3, 1817, ch. 92, 3 Stat. 383.

[23] Act of May 6, 1822, ch. 58, 3 Stat. 682.

fense and security of the western frontier. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978) (purpose of 1790 Trade and Intercourse Act "to prevent destructive retaliations by the Indians"). *See generally*, Paterson and Roseman, *supra*, 31 Me. L. Rev. at 121-25. The initial regulation of Indian affairs resulted from the appeals of President Washington and Secretary of War, Henry Knox, to Congress. *See* Petition for Cert. at 10-13. Both of these men viewed the antagonism of the powerful Indian tribes on the frontier occasioned by sharp dealing traders and speculators as the mischief to be prevented. The alternative of armed action against the Indian tribes on the frontier to force those Indian tribes west of the Mississippi was considered briefly by Secretary of War Knox and President Washington, but rejected as impractical and dishonorable. *Report from H. Knox, Secretary of War, to the President of the United States Relative to Northwest Indians*, June 15, 1789, *American State Papers* (Indian Affairs, vol. I, 1832), pp. 12-13 (Washington; Gales and Seaton, 1832). Congress consequently decided to pursue security on the frontier through the Trade and Intercourse Acts rather than through war. *See generally*, F.P. Prucha, *American Indian Policy In the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*, at 44-49 (1962).

The express language of the Trade and Intercourse Acts, as amplified by the purpose underlying those Acts, clearly evidenced the intent of Congress to limit the regulation of Indian tribes to that area known as "Indian country"[24] in the same manner as its predecessor, the Continental Congress, had. F.P. Prucha, *supra*, at 45, 52 (the 1790 Trade and Intercourse Act "continued the pattern set in the Ordinance of 1786 and earlier colonial legislation"). *See* Paterson, and Roseman,

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[24] The intent of Congress to so limit regulation of Indian tribes also is expressed in a number of other statutes and treaties. *See, e.g.*, Act of May 28, 1830, 4 Stat. 411; Treaty with the Cherokee Nation, July 8, 1817, 7 Stat. 156.

supra, 31 Me. L. Rev. at 125-130.[25] These Acts exhibit a constant effort to regulate relations with those Indian tribes residing in Indian country and protected in their lands by treaty. Equally evident was Congress' intention to refrain from regulating relations with those Indians and tribes of Indians who were under the jurisdiction of the several states.[26] Because the Court of Appeals failed to recognize Congress' intent and the resultant express geographic limitations embodied in the Trade and Intercourse Acts, it incorrectly decided that the Nonintercourse statute applied outside Indian country.

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[25] The Court of Appeals theorized that the Congress may have intended to regulate Indian affairs more extensively than had the Continental Congress. (App. 20a.) This unsupported hypothesis is contradicted by Justice Baldwin's statement in *Cherokee Nation* v. *State of Georgia*, 30 U.S. 25, 41, 5 Pet. 1, 45 (1831):

> The legislation of Congress under the constitution in relation to the Indians has been in the same spirit and guided by the same principles, which prevailed in the old Congress and under the old confederation. . . .
>
> In 1802 Congress passed the Act regulating trade and intercourse with the Indian tribes, in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations . . ..

Justice Baldwin's statement concerning "continuity of Indian policy" has been confirmed by a number of leading commentators. R. Horsman, *Expansion and American Indian Policy 1783-1812*, at 62 (1967); G. Harmon, *Sixty Years of Indian Affairs, Political, Economic and Diplomatic 1789-1850*, at 18-19 (1960 Reprint).

[26] This limitation on applicability of the Nonintercourse statute also is evidenced by contemporaneous administrative actions. For example, in his 1830 report to Congress, Commissioner of Indian Affairs Hamilton recommended a change in the Indian boundary line delineated by the 1802 Trade and Intercourse Act:

> It is believed that the line defined by the Act of 1802 as the Indian boundary and *to which its provisions were intended particularly to apply*, has long since ceased to be so.

1 W. Washburn, *The American Indian and the United States: A Documentary History*, at 16-17 (1973) (emphasis added).

B. *Congress Intended that the "Surrounded by Settlements" Exception Apply to Transfers of Land.*

In holding that the "surrounded by settlements" exception of the various Trade and Intercourse Acts did not apply to land transactions, the Court of Appeals relied upon the location of the exception in the 1790 Act. Section 1 of that Act provided that "no person should be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose." (App. 53a.) A proviso at the end of section 1 then stated that "the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper." (*Id.*) Because the sale of lands was specifically mentioned only in section 4 of the 1790 Act, which contained no similar proviso, the Court of Appeals reasoned that the "surrounded by settlements" exception had no applicability to land transactions. (App. 29a.)

A careful reading of the Trade and Intercourse Acts refutes the Court of Appeals' analysis. In 1793,[27] what was once a proviso to section 1 of the 1790 Act was moved to a separate section near the end of the Act. Section 13 of the 1793 Act provided:

> *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with In-

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[27] The "surrounded by settlements" exception was contained in section 13 of the 1793 Act and section 19 of the 1796, 1799 and 1802 Acts. (App. 60a, 70a, 73a, 78a.) The exception was removed from the Act in 1834. The savings clause contained in section 29 of the 1834 Act, however, left the 1802 Act intact insofar as it applied to Indian tribes residing east of the Mississippi River. (App. 89a-90a.) As a result, the "surrounded by settlements" exception, which by its terms applied only within the jurisdiction of the states, remained in effect until the savings clause was dropped in 1873. U.S. Rev. Stat., tit. XXVIII, ch. 3, § 2116 (1873). *See* Note, *Land Claims Under the Indian Trade and Intercourse Acts: The White Settlement Exception Defense*, 60 B.U.L. Rev. 911, 912 (1980).

> dians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

Similar provisions were contained in section 19 of the 1796, 1799 and 1802 Acts.

The removal of the exception from the licensure provisions of section 1 to a separate section contraverts the reasoning of the Court of Appeals. The proviso contained in section 1 of the 1790 Act provided for Presidential discretion for the sole purpose of exempting surrounded tribes from the licensure requirements of that section. The exception contained in the later Acts made no reference to licenses. Rather, the exception provided that "nothing in this act shall be construed to prevent any trade or intercourse with Indians" covered by the exception. It thus is clear from the language and location of the 1793 proviso that Congress intended a broad expansion of the "surrounded by settlements" exception, and was determined to exempt the surrounded Indians from "any" restrictions on trade and intercourse.[28] The only relevant question, therefore, is whether land transactions fall within the ambit of "trade or intercourse" as used in the exception.

Webster's New World Dictionary of the American Language (Concise Edition 1960) defines trade as "buying and selling; commerce." The same dictionary defines intercourse as "communication or dealings between or among people, countries, etc.; interchange of products, services, ideas, etc." It is difficult to imagine broader terms than these for describ-

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[28] The Court of Appeals attempted to discard this problem by reasoning that the change in the 1793 Act was intended merely to withdraw the matter from Presidential discretion and make it mandatory. (App. 28a.) If that were Congress' intent, however, it could have been accomplished by the less drastic measure of retaining the proviso in section 1 and altering the language.

ing dealings between Indians and United States citizens. To hold that the purchase and sale of land is not "commerce" or "dealings between or among people" is to ignore the plain meaning of the language used.

This Court itself has equated trade and intercourse as used in these Acts with "commerce" as used in the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. In *United States* v. *Holliday*, 70 U.S. 182, 3 Wall. 407 (1866), this Court was asked to determine whether the Act exceeded the federal government's power under the Commerce Clause. This Court held:

> The Act in question, although it may partake of some of the qualities of those Acts passed by State Legislatures, which have been referred to the police powers of the States, is, we think, still more clearly entitled to be called a regulation of commerce. . . . '[C]ommerce undoubtedly is traffic, but it is something more; it is intercourse.' The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce; and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

70 U.S. at 185, 3 Wall. at 410. By equating "commerce" with "trade or intercourse," the Court gave the Act's language an expansive interpretation. There is no doubt that the commerce power of the Constitution extends to transactions in land.[29] After *Holliday*, neither can there be any doubt that the phrase "trade or intercourse" as used in the Trade and In-

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[29] Indeed, if the transfer of land is not "commerce," Congress' power to regulate "commerce" with the Indian tribes, U.S. Const. art. I, § 8, cl. 3, would not permit the enactment of the prohibitions embodied in the Nonintercourse statute.

tercourse Act encompasses the sale of land.[30] *See* Note, *Land Claims Under the Indian Trade and Intercourse Acts: The White Settlement Exception Defense*, 60 B.U.L. Rev. 911, 925 n.103 (1980).

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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[30] To be sure, the Indian Trade and Intercourse Acts each contained a separate section prohibiting the purchase of Indian land without federal authorization. That land, more valuable to the Indians than a peddler's merchandise, required special protection under the Acts does not mean that transfers of such land are not "trade or intercourse" covered by the "surrounded by settlements" exception. For example, section 6 of the 1793 Act sets forth special requirements for the purchase of Indians' horses, another especially important item to the Indians. (App. 57a.) The logical extension of the Court of Appeals' reasoning would exclude horse sales from the definition of "trade or intercourse." Under the plain meaning of the language used, however, it cannot be disputed that a person purchasing a horse from an Indian is engaged in "trade or intercourse" with the seller. The same holds true for land sales.

APPENDIX

Appendix A.

Nos. 78-160 and 78-161

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY TIBBALS WILSON, ET AL., PETITIONERS,

v.

OMAHA INDIAN TRIBE AND
THE UNITED STATES OF AMERICA.

STATE OF IOWA, ET AL., PETITIONERS,

v.

OMAHA INDIAN TRIBE AND
THE UNITED STATES OF AMERICA.

Motion for Modification of Opinion.

WADE H. MCCREE, JR.
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ROY TIBBALS WILSON, ET AL., PETITIONERS,

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Motion for Modification of Opinion.

The Solicitor General on behalf of the United States, respectfully moves for modification of the opinion in this case, announced on June 20, 1979.[1]

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[1] Such modification of an opinion without granting rehearing is, of course, not unfamiliar practice in this Court. See, e.g., *SEC* v. *Drexel & Co.* 349

1. On page 12 of the slip opinion the Court discusses the geographic applicability of the Nonintercourse Act of 1834, ch. 161, 4 Stat. 729, in language that may well be deemed dispositive of a number of pending eastern land claim cases[2] (as well as additional claims that have been asserted but not yet made the subject of litigation).[3] The question was not explored in the courts below, nor was it briefed or argued here. Since its resolution was not essential to the decision of the case, this Court may not have had occasion fully to consider the complexity of the issue. In these circumstances, the Court may deem it appropriate to withdraw the portions of the opinion discussing the geographic scope of the 1834 Act, so that the question may be left open for consideration in the lower courts and, if necessary, resolved by this Court after full briefing and argument.

2. The matter is not as straightforward as might at first appear. As this Court noted (slip op. 12), Section 1 of the Act de-

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U.S. 910, 913 (1955); *Slochower* v. *Board of Higher Education*, 351 U.S. 944 (1956); *Swenson* v. *Sridham*, 410 U.S. 904 (1973); *City of Virginia Beach* v. *Howell*, 411 U.S. 922 (1973).

[2] E.g., *Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977), aff'd, 592 F.2d 575 (1st Cir. 1979); *United States* v. *Maine*, Civil Nos. 1966-ND and 1969-ND (D. Me.); *Oneida Indian Nation of New York* v. *Williams*, Civil No. 74-CV-167 (N.D. N.Y); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527 (N.D. N.Y. 1977) (holding conveyance to State in 1795 violated Nonintercourse Act of 1790, ch. 33, 1 Stat. 137, and is therefore of no validity); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976) (denial of defendant's motion to amend answer to add defenses of laches, adverse possession, statute of limitations, and state market title statute; grant of motion to amend to add defense of waiver and estoppel); *Mohegan Tribe* v. *Connecticut*, Civil No. H-77-434 (D. Conn.); *Western Pequot Tribe of Indians* v. *Holdridge Enterprises, Inc.*, Civil No. H-76-193 (D. Conn.).

[3] For example, settlement negotiations are now taking place with regard to claims involving the Catawba Indian Tribe of South Carolina, the Gay Head Wampanoag Band in Massachusetts, and the St. Regis-Mohawk, and Cayuga claims in New York.

fines Indian country to include certain areas west of the Mississippi, and also "that part of the United States east of the Mississippi river, and not within any state to which Indian title has not been extinguished" (4 Stat. 729). Although this Court's discussion apparently assumes that the definition in Section 1 does not include any areas within the geographic limits of any state east of the Mississippi,[4] we believe that the definitional language is equally susceptible to the interpretation that Indian country includes all Indian lands that are within the geographical bounds of a state, but not within its ordinary political jurisdiction. At the very least this question is, as the leading authority on Indian law acknowledges, "not free from doubt," F. Cohen, *Handbook of Federal Indian Law* 6 (1942) (footnote omitted), and this Court's prior decisions offer substantial support for the view that Indian country includes lands within the geographic bounds of the States. See *Ex parte Crow Dog*, 109 U.S. 556, 561-562 (1883); *Bates* v. *Clark*, 95 U.S. 204, 207-209 (1877); *The New York Indians*, 72 U.S. (5 Wall.) 761, 770-771 (1866); cf. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 118-124 (1960); *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913).

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[4]The opinion states (slip op. 12; emphasis added):

> Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194 was "intended to apply to the whole Indian country, as defined in the first section." H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished. . . ." Although this definition was discarded in the Revised Statutes, see R. S. 5596, *it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.*

The interpretation we have suggested would be consistent with Justice McLean's analysis of the Nonintercourse Act of 1802, ch. 13, 2 Stat. 139 *et seq.*, in his concurring opinion in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 589 (1832) (which was written just two years prior to the enactment of the Nonintercourse Act of 1834):

> Does the intercourse law of 1802 apply to the Indians who live within the limits of Georgia? The 19th section of that act provides, "that it shall not be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states." This provision, it has been supposed, excepts from the operation of the law, the Indian lands which lie within any state. A moment's reflection will show that this construction is most clearly erroneous. To constitute an exception to the provisions of this act, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and *within the ordinary jurisdiction of a state; not only within the limits of a state, but within the common exercise of its jurisdiction.* No one will pretend, that this was the situation of the Cherokees who lived within the state of Georgia in 1802; nor, indeed, that such is their present situation. If, then, they are not embraced by the exception, all the provisions of the act of 1802 apply to them.

Although Justice McLean was discussing the predecessor to the 1834 Act, we know of no evidence that the 1834 Act was intended to have a narrower scope than its predecessor.

Moreover, even assuming that the definition of Indian country in Section 1 of the 1834 Act was intended to be narrower than that in the 1802 Act (which was at issue in *Worcester* v. *Georgia*), the analysis of the geographic applicability of Nonintercourse Act should also take account of the proviso in Section 29 of the 1834 Act, 4 Stat. 734, which states that the repeal of the 1802 Nonintercourse Act "shall not * * * impair or affect the intercourse act of eighteen hundred and two, *so far as the same relates to or concerns Indian tribes residing east of the Mississippi*" (emphasis added).[5] At least as to the provision in question in the present case — now codified as 25 U.S.C. 194 — this Court concluded (slip op. 9) that Congress intended the version incorporated in the 1834 Act to have the same meaning as the version in the 1802 Act, which *could* be applied in the eastern states under Section 29, if the 1834 version were not applicable.

3. The Court's opinion also assumes that Section 194 (Section 22 of the 1834 Act) would be applicable only in Indian country. But this is far from clear. In contrast to many other sections of the 1834 Act which were expressly made applicable in "Indian country,"[6] Section 22 made no reference to Indian

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[5] Because this portion of Section 29 was adopted as a Senate floor amendment, it was not discussed in the House Committee Report cited by this Court in its discussion of the geographic applicability of the Act. See note 4, *supra*.

[6] See, e.g., Section 2, 4 Stat. 729 (no person permitted to trade "in Indian country" without a license); Section 3, 4 Stat. 729 (license to trade may be refused if it would be improper to permit applicant "to reside in the Indian country"); Section 4, 4 Stat. 729-730 (non-Indian who attempts "to reside in the Indian country" without a license shall forfeit his goods); Section 6, 4 Stat. 730 (foreigners must obtain passports to "go into the Indian country"); Section 7, 4 Stat. 730 (prohibition against non-Indians bartering "within the Indian country"); Section 10, 4 Stat. 730 (authorizing the forcible removal of persons "from the Indian country"); Section 16, 4 Stat. 731 (commission of a crime "within the Indian country"); Section 17, 4 Stat. 731 (indemnification for destruction of property "within the Indian country").

country. To the contrary, like a few other sections of the Act,[7] it was worded broadly without any suggestion of a geographic limitation:

> * * * in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

4. We have pointed up some of the problems involved in defining the geographic scope of the 1834 Act without attempting to resolve them, or suggesting that this Court should do so here. On the contrary, it was never disputed that, as a matter of geography, the Act applied to the Omaha Reservation, and it is therefore unnecessary for this Court to determine which areas are reached by the several provisions of the Act. Our submission is simply that the Court should withdraw the passage of its opinion that may be read as prejudging a number of cases pending in other courts.[8]

Respectfully submitted,
WADE H. MCCREE, JR.
Solicitor General

JULY 1979

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[7] E.g., Section 12, 4 Stat. 730 (purchases or grants from Indian tribes invalid unless made by treaty or convention; includes express reference to "agents of any state" who may be present when treaties are agreed upon); Section 13, 4 Stat 731 (prohibition against any person sending messages to Indian tribe, chief, or individual intending to incite treaty violations or disturb the peace); Section 15, 7 Stat. 731 (prohibition against person "living among the Indians, or elsewhere within the territory of the United States" corresponding with foreign powers who want tribes to go to war with the United States).

[8] Indeed, we are informed that the State of Maine has already filed an amicus brief in *Mohegan Tribe* v. *Connecticut*, Civil No. H-77-434 (D. Conn.), citing this portion of the Court's opinion in support of the argument that the Nonintercourse Acts did not apply in the eastern States.